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In the Supreme Court of the United States

OCTOBER TERM, 1997

VICKY LEWIS AND GARY LEWIS, INDIVIDUALLY, AS PARENTS, AS NEXT FRIENDS, AND AS ADMINISTRATORS OF THE ESTATE OF KATHRYN C. LEWIS,

Petitioners,

v.

BRUNSWICK CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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31 pp

QUESTION PRESENTED

Whether the court of appeals correctly held that the Federal Boat Safety Act of 1971 preempts a state common law requirement that recreational boats be equipped with propeller guards, where the United States Coast Guard, after extensive administrative proceedings, determined that such a requirement would be contrary to the interests of boat safety.

RULE 29.6 STATEMENT

Respondent Brunswick Corporation has the following subsidiaries (other than wholly-owned subsidiaries): Doellwood Financial, Inc.; Enhanced Energy Systems, Inc.; Intellitec International Inc.; Jewon, Co., Ltd.; Juangxi Marine Company, Limited; Merc Spader, Inc.; Nippon Brunswick Kabushiki Kaisha; Nireco Corporation; Sugita Seisakusho Co., Ltd.; Texas Lounge Operations, Inc.; Texas Thousand Oaks, Inc.; Tohatsu Marine Corporation; and Wayne Recreation Center Lounge, Inc.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Petitioners seek review of the decision in this case by asserting that the Eleventh Circuit misapplied "recent Supreme Court holdings on pre-emption." Pet. i. They do not contend that the Eleventh Circuit's decision interpreting the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 ("Boat Safety Act" or "Act"), conflicts with the decision of any other court under that statute. Indeed, the petition does not cite any other case that mentions — let alone interprets — the Boat Safety Act.

Contrary to the impression created by the petition, however, the Eleventh Circuit's holding that petitioners' tort claims are preempted follows a long line of federal and state court decisions finding federal preemption under the Boat Safety Act. Moreover, the three "prior analogous decisions of this Court" cited by petitioners (Pet. 3) do not compel a contrary conclusion. Those decisions, which involved completely different statutory and regulatory schemes, as well as numerous other decisions by this Court, support the preemption analysis of the Eleventh Circuit.

At bottom, the petition offers no plausible reason why the Court should review this unexceptional decision on a well-settled issue of law. In fact, the Court has denied review of this issue in several similar cases in recent Terms.

STATEMENT

A. The Boat Safety Act and Federal Preemption

The Boat Safety Act was enacted by Congress to "reduce the level of fatalities now resulting from boating mishaps" by establishing "a coordinated national boating safety program." S. Rep. No. 92-248, 92d Cong., 1st Sess. 1 (1971) ("Senate Report"). The safety program created by the Act requires manufacturers to comply with "national construction and performance standards for boats and associated equipment" established by the United States Coast Guard. *Id.* at 15; see 46 U.S.C. § 4302(a)(1) (authorizing "minimum safety standards for recreational vessels and associated equipment"). In considering

whether or not to adopt a safety standard, the Coast Guard is required to "consult with" the National Boating Safety Advisory Council ("the NBSAC" or "Committee"), 46 U.S.C. § 4302(c)(4), a group of experts and other persons interested in boat safety established by the Act, 46 U.S.C. § 13110.[1]

Congress declared that the safety program established by the Boat Safety Act must be based on uniform national standards:

> The need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level.

Senate Report at 14. To achieve national uniformity, and in deference to the "long history of preemption in maritime safety matters" (*id.* at 20), Congress included the following broad preemption provision in the Act (46 U.S.C. § 4306):

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine

[1] The 21 members of the NBSAC, who are appointed by the Secretary of Transportation, must be individuals who have particular expertise, knowledge, and experience in recreational boating safety. 46 U.S.C. § 13110(a). The NBSAC members are selected from, and represent, three different constituencies: (a) seven state officials responsible for state boat safety programs; (b) seven representatives of recreational vessel manufacturers and associated equipment manufacturers; and (c) seven representatives of national recreational boating organizations and the general public. *Id.* at § 13110(b)(1).

> safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

By mandating that state laws and regulations be "identical" to regulations issued by the Coast Guard, the preemption section of the Boat Safety Act insures that boat manufacturers need not be concerned about "compliance with widely varying local requirements." Senate Report at 20. The statute does allow the states some latitude to "impose requirements with respect to carrying or using marine safety articles which go beyond the federal requirements when necessary to meet uniquely hazardous local conditions or circumstances." *Ibid.*[2] The preemption section reserves to the Coast Guard, however, a "right of disapproval" over these state requirements "to insure that indiscriminate use of state authority does not seriously impinge on the basic need for uniformity." *Ibid.*

The Boat Safety Act also includes a so-called "savings" clause, which provides that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). The Senate Report on the Act explains (at 32) that the "purpose of the section is to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability."

B. The Coast Guard's Decision Not to Require Propeller Guards

In 1988, the Coast Guard requested the NBSAC to consider whether propeller guards should be required on recreational

[2] The Boat Safety Act also "does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern." Senate Report at 20.

vessels. The Coast Guard's charge to the Committee asked it to:

> • Review the available data on the prevention of propeller-strike accidents and the Coast Guard study of various methods of shrouding propellers to prevent contact with a person in the water.
>
> • Assess the arguments for and against some form or mechanical guard to protect against propeller strikes reflecting the positions of state boating law administrators, the recreational boating industry, and the boating public.

National Boating Safety Advisory Council, *Report of the Propeller Guard Subcommittee* ("Subcommittee Report") App. A (R. Ex. 5); see Pet. App. A6.[3] In particular, the Coast Guard asked the Committee whether there should be "a federal requirement for some form of propeller guard." Subcommittee Report App. A; Pet. App. A6.

In response to the Coast Guard's request, the NBSAC established a special Propeller Guard Subcommittee to consider the issue after gathering information from a wide range of public and private sources. Subcommittee Report at 1. The Subcommittee received and reviewed files and information supplied by the Coast Guard. *Ibid.* In addition, the Subcommittee solicited and reviewed "files, data, case histories and other information" from diverse individuals and organizations interested in boat safety, *ibid.; id.* at Apps. B-C, including representatives of boat manufacturers and counsel representing injured persons in product liability actions. *Id.* at 3-4.[4]

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[3] "R." refers to the Plaintiffs' and Defendant's Joint Stipulation of Facts filed in the district court.

[4] At least six of the 24 individuals contacted by the Subcommittee were either attorneys or expert witnesses retained by plaintiffs in product liability litigation to advocate the use of propeller (continued...)

During its extensive fact-finding activities conducted over more than a year, the Subcommittee held public meetings across the country, providing interested persons and organizations the opportunity to present testimony on whether propeller guards should be required by the Coast Guard. Subcommittee Report at App. D. In its comprehensive review, the Subcommittee examined "[v]arious types of propeller guards, both commercially available and experimental, underwater motor housing appendages and other relevant materials," and operated boats equipped with and without guards. *Id.* at 2.

Evidence produced to the Subcommittee indicated that "boating fatalities involving the propeller" number "approximately 30-49 * * * per year." Subcommittee Report at App. E, 1-2. "On an absolute basis this is one third to one half the number of fatalities associated with being struck by lightning." *Id.* at App. E, 2. Indeed, in light of the large number of people who use recreational vessels each year (the "boat population" of the United States exceeded 17 million in 1988, *id.* at 9), the number of propeller incidents is small compared to the total number of boating accidents. *Id.* at 10, App. E; see *id.* at 23 ("the propeller itself is the sole factor only in a minority of impacts").

After its extensive fact-finding was completed, the Subcommittee unanimously adopted a lengthy Report, which concluded that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards." Subcommittee Report at 24. Among the significant safety concerns supporting this recommendation were the lack of a feasible propeller guard for any pleasure craft traveling at normal operating speeds ("propeller guards affect boat operation adversely at speeds greater than 10 miles per hour" (Pet. App. A7)), serious steering and handling problems caused by propeller guards (along with

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[4] (...continued)
guards. Subcommittee Report at App. B.

increased drag and loss of speed), and safety problems concerning underwater impacts by propeller guards. Subcommittee Report at 12-17, 20-21.[5]

In light of these substantial safety concerns, the Report concluded that "[t]he development and use of devices such as 'propeller guards' can, therefore, be counter-productive and can create new hazards of equal or greater consequence." Pet. App. A7. *In short, propeller guards would make boats less safe*. As a result, the Subcommittee recommended that the Coast Guard not require propeller guards and cautioned that the "boating public must not be misled into thinking there is a 'safe' device which would eliminate or significantly reduce * * * injuries or fatalities." *Id.* at A7-A8.

The full NBSAC considered the Subcommittee's Report at its meeting in November 1989. See *Minutes of the 44th Meeting*

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[5] "After considering the available data on propeller strike accidents [and] the testimony of numerous experts, the subcommittee determined that propeller guards are not feasible for recreational boats because they decrease an operator's ability to maintain control over the boat at 'normal' speeds, *increase* the probability of striking a body in the water, and create a possibility of causing greater injury to those struck." *Mowery* v. *Mercury Marine, Division of Brunswick Corp.*, 773 F. Supp. 1012, 1016 (N.D. Ohio 1991) (emphasis in original).

In addition, although propellers "present the hazard of cutting wounds and penetration of the body," propeller "guards (which increase significantly the potential impact area) present the additional hazard of blunt trauma injuries, which are often more severe." Subcommittee Report at 18-19. For example, "a skull impact at 10 mph or more in the water would be generally fatal." *Id.* at 17.

The Subcommittee Report also noted that so-called "ring-type guards" create "a new hazard" of arms and legs being "caught by the bars or rings and held against the rotating propeller." *Id.* at 20-21.

of the National Boating Safety Advisory Council at 17-19 (Nov. 6-7, 1989) (R. Ex. 6). All 21 members of the Committee, representing state governments, boat manufacturers, and the interested public (see note 1, *supra)*, voted to adopt the Report and its conclusions and recommendations. *Id.* at 19; Pet. App. A8. The Report and all of the documentary materials reviewed by the Propeller Guard Subcommittee were then forwarded to the Coast Guard. Subcommittee Report at 1.

After considering these voluminous materials, the Coast Guard decided to accept all of the recommendations of the NBSAC and the Subcommittee Report. Pet. App. A9. In particular, with respect to the NBSAC's recommendation that the "U.S. Coast Guard should take no regulatory action to require propeller guards," the Coast Guard concluded that "[a]vailable propeller guard accident data *do not support imposition of a regulation requiring propeller guards*." *Ibid.* (emphasis added). At the same time, the Coast Guard announced that it would continue to "review and retain any information * * * regarding development and testing of new propeller guarding devices or other information on the state of the art." *Ibid.*

In light of this extensive and uncontradicted record, the courts that have considered claims such as petitioners' on the merits have reached the same conclusion as the Coast Guard regarding the feasibility and safety of propeller guards. In *Elliott* v. *Brunswick Corp.*, 903 F.2d 1505 (11th Cir. 1990), cert. denied, 498 U.S. 1048 (1991), for example, "[b]oth parties' witnesses * * * testified regarding potential difficulties that these devices might engender" and "[b]oth parties' experts * * * explained that guards themselves can become a danger as they move through the water." 903 F.2d at 1509. Based on this undisputed evidence, the court concluded (*ibid.*; emphasis added):

> [C]urrent industry standards, and the federal regulations, simply reflect the consensus of experts that the industry's

adaption of propeller guards at this point *would not only be infeasible, but unwise, unsafe and unfortunate*.

To the same effect are *Allen* v. *Minnstar, Inc.*, 8 F.3d 1470, 1481 (10th Cir. 1993) ("the record shows * * * the absence of evidence that there was a feasible, safer alternative design for a propeller guard"), and *Pree* v. *Brunswick Corp.*, 983 F.2d 863 (8th Cir.), cert. denied, 510 U.S. 815 (1993) ("[e]xperts for both sides * * * testified regarding the potential difficulties that propeller guards might engender"). State courts have reached the identical conclusion. See, *e.g.*, *Fitzpatrick* v. *Madonna*, 424 Pa.Super. 473, 623 A.2d 322 (1993); *Beech* v. *Outboard Marine Corp.*, 584 So.2d 447 (Ala. 1991).

C. The Proceedings Below

In June 1993, petitioners' daughter "fell or was thrown" from the boat in which she was riding on Strom Thurmond Lake in Georgia. Pet. App. A3. She was struck in the head and body by the propeller of the boat's engine and died from her injuries. *Id.* at A3-A4. The engine, which was designed and manufactured by respondent Brunswick Corp., did not have a propeller guard. *Ibid.*

Petitioners "filed suit against Brunswick in Georgia state court, alleging that the lack of a propeller guard made the Brunswick engine a defective product." Pet. App. A4. Brunswick removed the case to federal court. *Ibid.* The district court granted Brunswick's motion for summary judgment on petitioners' state tort law claims, concluding that petitioners' claims were preempted by the Boat Safety Act. *Ibid.*

The court of appeals affirmed. Pet. App. A1-A25. The Eleventh Circuit held that petitioners common claims were not expressly preempted by § 4306 of the Boat Safety Act because of the presence of the "savings clause" in § 4311(g) of the Act. "[T]he savings clause indicates that at least some common law claims survive express preemption." *Id.* at A14. As a result, the court resolved its doubts about whether petitioners' claims

were expressly preempted "in favor of the narrow interpretation of the preemption clause and conclude[d] that the express preemption clause does not cover common law claims." *Ibid.*

The court of appeals nonetheless held that petitioners' common law claims were impliedly preempted by the statute: "claims based on the failure to install a product that the Coast Guard has decided should not be required would conflict with the regulatory uniformity purpose of the [Boat Safety Act]." Pet. App. A22. "Given that Congress intended for the [Boat Safety Act] to create a uniform system of regulation, and that the Coast Guard has determined that propeller guards should not be required, the Coast Guard's position mandates an absence of both federal and state propeller guard requirements." *Id.* at A20.

REASONS FOR DENYING THE PETITION

After an extensive public investigation, the Coast Guard concluded that, for safety reasons, propeller guards should not be required on recreational boats. Petitioners seek to second-guess that federal determination and impose state law liability on respondent for not including a propeller guard on the boat that struck their daughter. This proposed common law rule, however, is plainly preempted by the Boat Safety Act, because it conflicts with and frustrates the purposes of the federal boat safety scheme established by Congress.

Virtually every court to consider the question has agreed with the courts below that common law claims such as petitioners' are preempted by the Boat Safety Act. See *Carstensen* v. *Brunswick Corp.*, 49 F.3d 430 (8th Cir.), cert. denied, 116 S. Ct. 182 (1995); *Ryan* v. *Brunswick Corp.*, 454 Mich 20, 557 N.W.2d 541 (1997); *Moss* v. *Outboard Marine Corp.*, 915 F. Supp. 183 (E.D. Cal. 1996); *Davis* v. *Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993); *Shield* v. *Bayliner Marine Corp.*, 822 F. Supp. 81 (D. Conn. 1993); *Shields* v. *Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991); *Parker* v. *Outboard Motor Corp.*, No. J90-0011(L) Slip. Op. at 2 (S.D. Miss.

Feb. 28, 1991); *Mowery* v. *Mercury Marine*, 773 F. Supp. 1012 (N.D. Ohio 1991); *Farner* v. *Brunswick Corp.*, 607 N.E.2d 562 (Ill. App. Ct. 1992), app. denied, 616 N.E.2d 333 (Ill. 1993).[6]

Petitioners simply ignore these decisions interpreting the Boat Safety Act, which fully support the result in this case. Instead, they argue (Pet. 3-13) that the Eleventh Circuit's preemption holding conflicts with this Court's rulings in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992); *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995); and *Medtronic, Inc.* v. *Lohr*, 116 S. Ct. 2240 (1996).

These purported conflicts, however, are wholly illusory. The Eleventh Circuit faithfully applied this Court's preemption jurisprudence in joining all of the other courts that have found

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[6] In "the only case to reach a contrary conclusion," *Moss*, 915 F. Supp. at 186 n.2, the Texas Supreme Court held in *Moore* v. *Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), cert. denied, 513 U.S. 1057 (1994), that a "no-propeller-guard" tort claim was not preempted by the Boat Safety Act. The Texas court "recognize[d] that [its] holding conflicts" with a long line of federal and state court decisions. *Id.* at 252. Nonetheless, the court did not find these decisions "persuasive," in light of "the Supreme Court's apparent turn to stricter preemption analysis." *Ibid.* The "apparent turn" in preemption analysis was, in fact, the decision of the Eleventh Circuit in *Myrick* v. *Freuhauf Corp.*, 13 F.3d 1516 (1994), which misread this Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), to "question[] the propriety of an implied preemption analysis when presented with an express preemption clause." 889 S.W.2d at 251 n.10.

This Court flatly repudiated the Eleventh Circuit's analysis in *Myrick*, holding that the presence of an express preemption clause "does not mean that the express clause entirely forecloses any possibility of implied preemption." 514 U.S. at 288. Thus, the continuing validity and relevance as a precedent of the decision in *Moore* is completely undermined. Perhaps for that reason, petitioners do not even cite it.

common law tort claims like petitioners' preempted by the Boat Safety Act. There is, therefore, no reason for this Court to grant the petition and review this straightforward issue on which the lower courts have spoken with one voice.

I. THE BOAT SAFETY ACT EVINCES NO CONGRESSIONAL INTENT TO PRECLUDE IMPLIED CONFLICT PREEMPTION OF COMMON LAW CLAIMS

The Eleventh Circuit held that "claims based on the failure to install a product that the Coast Guard has decided should not be required would conflict with the regulatory uniformity purpose of the" Boat Safety Act (Pet. App. A22) and thus would frustrate the "'accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at A15, quoting *Myrick*, 514 U.S. at 287. *Petitioners make no effort to dispute that conclusion.* Instead, they assert (Pet. 3-6) that Congress intended to allow the states to frustrate the purposes of the Boat Safety Act by precluding the possibility of implied conflict preemption. Not surprisingly, they offer no evidence to support that remarkable assertion.

Relying on this Court's preemption analysis in *Cipollone*, 505 U.S. at 517-518, petitioners contend that the text of the Boat Safety Act alone provides a "reliable indicium of Congressional intent" to preclude implied conflict preemption of common law claims. Thus, petitioners assert that the absence of a reference to common law claims in the Act's preemption clause and the language of the "savings clause" in § 4311(g) (compliance with the Act "does not relieve a person from liability at common law") combine to show a congressional intent "to save common law liability from pre-emption." Pet. 6. Petitioners also invoke the "'assumption that the historic police powers of the States [a]re not to be superseded * * * unless that [i]s the clear and manifest purpose of Congress.'" Pet. 4 (quoting *Cipollone*, 505 U.S. at 517). Petitioners' analysis is flawed at every turn.

A. To begin with, as the Eleventh Circuit correctly noted (Pet. App. A15), there is no presumption against implied conflict preemption. Under the Supremacy Clause, "'[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" *Felder* v. *Casey*, 487 U.S. 131, 138 (1988) (citations omitted).

Moreover, the traditional presumption against express preemption of state regulation of health and safety matters is entirely misplaced in the context of the Boat Safety Act, which implicates the "historic federal maritime jurisdiction." Senate Report at 17. Indeed, in adopting the Act's preemption clause, Congress invoked the "long history of preemption in maritime safety matters." *Id.* at 20. Boat safety is simply not and has never been a subject of traditional state regulation.

B. Petitioners' argument (Pet. 4-6, 10-13) that the text of the Boat Safety Act's *express* preemption and "savings" clauses preclude *implied* conflict preemption of common law claims is also plainly wrong.

1. As the Eleventh Circuit concluded, "Congress' decision not to specify 'common law' in the preemption clause" does not demonstrate "congressional intent to save common law claims." Pet. App. A12. The Act's preemption clause in § 4306 preempts any state "law or regulation." The "overwhelming majority of courts" have held that Congress' use of "the terms 'law' and 'regulation' evidence[s] an intent to include common law claims" within the scope of federal preemption. Pet. App. A13.[7] This Court's precedents fully support that holding. See, *e.g.*, *Cipollone*, 504 U.S. at 519-524, 548-549; *CSX Transp.*,

[7] See, *e.g.*, *Carstensen*, 49 F.3d at 431-432; *Moss*, 915 F. Supp. at 186; *Davis*, 854 F. Supp. at 1580; *Shield*, 822 F. Supp. at 84; *Shields*, 776 F. Supp. at 1581; *Mowery*, 773 F. Supp. at 1017.

Inc. v. *Easterwood*, 507 U.S. 658, 661-676 (1993); *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 100 (1972).

Accordingly, petitioners cannot rely on "Congress' decision to forego listing 'common law' in the Boat Safety Act's Preemption Clause" (Pet. 5) as a basis on which to conclude that Congress intended to preclude implied preemption of common law claims.

2. Petitioners' reliance (Pet. 5, 10-13) on the Act's so-called "savings" clause, 46 U.S.C. § 4311(g), is also misplaced. That provision indicates, at most, Congress' intent not to occupy the entire field of boat safety, so that common law claims could continue to be brought in areas not covered by a federal safety standard.

Faced with similar provisions in other statutes, this Court has consistently interpreted them in this fashion. In *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), for example, which held that a broadly worded savings clause was inapplicable where the plaintiff sought to impose common law liability for acts expressly permitted by a federal agency, the Court explained that general savings clauses do not allow states to enforce state law claims that conflict with federal law. *Id.* at 328. Rather, general savings clauses are included in federal statutes because, without them,

> it might have been claimed that, Congress having entered the field, the whole subject of liability * * * had been withdrawn from the jurisdiction of the state courts, so [the savings clause] was added to make plain that the Act was not intended to deprive the state courts of their general and concurrent jurisdiction.

Ibid. (internal quotation marks omitted).

Similarly, in *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915), the Court found that a savings clause "was added at the end of the statute — not to nullify other parts of the Act, or to defeat rights or remedies given by

preceding sections — but to preserve all existing rights which were not inconsistent with those created by the statute." And in *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907), the Court held that a broad savings clause ("[n]othing in this act contained shall in any way abridge or alter [common law] remedies" (internal quotations omitted)) could not be read to save common law rights "the continued existence of which would be absolutely inconsistent with the provisions of the act." Such a reading, the Court instructed, would cause the federal statute to "destroy itself." *Ibid.*

This Court has consistently adhered to these views. See, *e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383-391 (1992); *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 493-494 (1987); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 223, 230 (1986); *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 298-299 (1976). As these precedents indicate, Section 4311(g) was added to the Boat Safety Act not to defeat the statutory goal of creating a nationally uniform boat safety program, but rather to show Congress' intent not to preempt the remainder of the field of boat safety (such as safe boat operation and use, see note 2, *supra*) *not* covered by and *not* inconsistent with that federal program.[8]

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[8] Petitioners contend that the Eleventh Circuit's decision in this case draws a spurious distinction between "torts of omission" and "torts of commission" (Pet. 11), and imposes liability on the latter but not the former. In fact, the Eleventh Circuit drew no such distinction but merely suggested that a manufacturer might be liable for negligently designing or manufacturing a safety device (Pet. App. A22). This suggestion is entirely consistent with the decisions of other courts under the Boat Safety Act. For example, in *Mulhern* v. *Outboard Marine Corp.*, 432 N.W.2d 130 (Wis. Ct. App. 1989) (defective throttle), and *Rubin* v. *Brutus Corp.*, 487 So.2d 360 (Fla. Dist. Ct. App. 1986) (defective seat), the courts held that common law claims based on defectively designed and installed equipment were not preempted by the Boat Safety Act. As (continued...)

Petitioners nevertheless assert that the savings clause can "be given full effect without frustrating congressional purposes, since neither the Boat Safety Act nor the Coast Guard require Brunswick to do anything whatsoever in regard to propeller guards." Pet. 10. This argument stands federal preemption law on its head. The Coast Guard determined after a lengthy administrative process that propeller guards should not be required because it would make boating *less* safe. In the face of this determination, petitioners have propounded a common law rule that would require manufacturers to install propeller guards or face potentially massive damages liability under state law. Petitioners' perverse reading of the "savings" clause, which would allow the states to overrule Coast Guard determinations, would cause the Act to "destroy itself."[9]

II. NEITHER THE ABSENCE OF A REGULATION ADOPTED UNDER THE ADMINISTRATIVE PROCEDURES ACT NOR THIS COURT'S DECISION IN *MYRICK* PRECLUDE IMPLIED PREEMPTION

Petitioners assert (Pet. 6-7) that the Coast Guard's decision not to require propeller guards is a "mere internal adoption of

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[8] (...continued)
the Eighth Circuit observed in *Carstensen*, "common law claims asserting liability for defectively designed products that are actually installed may not be preempted." 49 F.3d at 432.

[9] Characterizing the Coast Guard's decision not to require propeller guards as an "option as a matter of implied federal regulation to either include guards or not" (Pet. 10) does not advance petitioners' case. This Court has long held that any state law that removes or restricts an option granted by federal regulation — as petitioners' proposed common law rule would in this case — conflicts with federal law and is preempted. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 708-709 (1984); *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 155 (1982).

a recommendation [that] cannot have any pre-emptive effect as it does not meet the express requirements of either § 4302 of the Boat Safety Act, or the requirements of the Administrative Procedures Act." They further maintain that this Court's decision in *Myrick* compels this conclusion (*id.* at 8-10). These arguments are plainly wrong.

In light of the extensive Coast Guard proceedings, which included notice of public meetings in the Federal Register and a written ruling announcing the final agency decision, petitioners' assertion (Pet. 7) that the Coast Guard's decision not to regulate propeller guards was not the product of "a formal rulemaking process" is preposterous. The Coast Guard took pains to insure that the public was given an opportunity to participate in the rulemaking and was notified of its results (see pages 4-7, *supra*). Petitioners apparently would require the Coast Guard to take the senseless step of issuing a regulation stating its intention *not* to regulate — a result required neither by the Boat Safety Act (see note 15, *infra*) nor by preemption law generally. Petitioners cite no support for their illogical position.

This Court's decision in *Myrick* — which involved an entirely different statutory scheme and a regulatory vacuum on the safety issue raised — does not alter this conclusion. In *Myrick*, the Court interpreted the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 ("Motor Vehicle Safety Act"),[10] and Federal Motor Vehicle Safety Standard 121, 49 C.F.R. § 571.121 ("Standard 121"), adopted by the National Highway Traffic Safety Administration ("NHTSA"). The Motor Vehicle Safety Act has a preemption clause (15 U.S.C. § 1392(d)), which provides:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

[10] The Motor Vehicle Safety Act was recodified at 49 U.S.C. §§ 30101-30169. We cite the prior codification on which the Court in *Myrick* relied.

Standard 121 at issue in *Myrick* "imposed stopping distances and vehicle stability requirements for trucks." 514 U.S. at 284. Because of the short stopping distances required by the standard, "several manufacturers notified NHTSA that ABS [anti-lock braking systems] would be required" to comply with Standard 121. *Id.* at 285. On judicial review of Standard 121, the Ninth Circuit suspended the standard because "NHTSA had failed to consider the high failure rate of ABS devices * * * [and] 'there [was] a strong probability that [ABS] had created a potentially more hazardous highway situation * * *.'" *Id.* at 284 (quoting *Paccar, Inc.* v. *NHTSA*, 573 F.2d 632, 642-643 (9th Cir.), cert. denied, 439 U.S. 862 (1978)). Thereafter, NHTSA amended Standard 121 "so that the stopping distances and lock-up requirements no longer applied to trucks and trailers." 514 U.S. at 285.[11]

The plaintiffs in *Myrick* were involved in accidents with trucks manufactured by the defendants. The plaintiffs brought suit, "alleg[ing] that the absence of ABS was a negligent design that rendered the vehicles defective." 514 U.S.. at 283. The defendants contended that these tort claims were both expressly and impliedly preempted by the Motor Vehicle Safety Act, but this Court rejected those arguments.

[11] NHTSA "left the unamended Standard 121 in the Code of Federal Regulations so that the 'affected sections [could] most easily be reinstated' when the agency met *Paccar*'s requirements. * * * NHTSA also stated that the provisions would remain in place so that manufacturers would know 'what the agency still considers to be reasonable standards for minimum acceptable performance.'" 514 U.S. at 285 (citations omitted).

The Court began its analysis with the Motor Vehicle Safety Act's preemption clause, which "applies only '[w]henever a Federal motor vehicle safety standard * * * is in effect' with respect to 'the same aspect of performance' regulated by a state standard." 514 U.S. at 286. Because "Standard 121 remains suspended," the Court concluded that "[t]here is simply no minimum objective standard stated at all," and the states were therefore free to adopt their own standards addressing the same issue. *Id.* at 286-287. Specifically, the Court found

> no evidence that NHTSA decided that trucks and trailers should be free from all state regulation of stopping distances and vehicle stability. Indeed, *the lack of federal regulation did not result from an affirmative decision of agency officials to refrain from regulating air brakes.*

Id. at 287 (emphasis added). Because the Court determined that there was no federal standard in effect, and that the absence of a standard did not indicate that federal authorities intended the area to be unregulated, it concluded that there was no express preemption and no implied conflict preemption (*id.* at 286-290).

This case is markedly different from *Myrick* in several critical respects. Here, unlike in *Myrick*, there *is* conclusive evidence that "the lack of federal regulation * * * result[ed] from an affirmative decision of agency officials to refrain from" requiring propeller guards. 514 U.S. at 287. This was not, as petitioners suggest, a cavalier decision by the Coast Guard based on cursory "internal" deliberations. Pet. 7. The record to the contrary is overwhelming: a year-long investigation of propeller-strike incidents and data by a federal advisory committee (the Propeller Guard Subcommittee of the NBSAC), with nationwide public hearings and voluminous documentary evidence, culminating in a lengthy report recommending — *for reasons of safety* — that there should be "no regulatory action to require propeller guards." See pages 4-7, *supra*.

The Coast Guard, after reviewing the Report and all of the evidence accumulated by the NBSAC, independently concluded

that "[a]vailable propeller guard accident data do not support imposition of a regulation requiring propeller guards on motor boats." Pet. App. A9. As the court observed in *Stanley* v. *Bertram-Trojan, Inc.*, 855 F. Supp. 657, 658 (S.D.N.Y. 1994), "propeller guards were specifically considered by the Coast Guard as a subject of regulation and were found not feasible because they may increase danger rather than reduce it."

The Coast Guard's decision on grounds of safety not to require propeller guards was not, as petitioners would have it, "mere internal adoption of a recommendation" without more. Pet. 7. It was precisely the kind of federal "inaction *joined with action*" that this Court in *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) (emphasis added), held preempts state law. In that case, the Court stated (*ibid.* (emphasis in original)):

> [D]eliberate federal inaction [does not] always imply pre-emption * * *. Where a comprehensive federal scheme intentionally leaves a portion of the regulated field [unregulated], *then* the pre-emptive inference can be drawn — not from federal inaction alone, but from inaction joined with action.

And this Court has repeatedly held that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (emphases in original); see also *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 151-152 (1989).[12]

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[12] "'[W]here failure of * * * federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted * * * to enact such a regu-

(continued...)

In this case, the Boat Safety Act and accompanying Coast Guard regulations — "a comprehensive federal scheme," *Puerto Rico Dep't of Consumer Affairs*, 485 U.S. at 503 — intentionally left propeller guards unregulated. In light of the voluminous record documenting the federal decision to leave propeller guards unregulated, "the pre-emptive inference can be drawn — not from federal inaction alone, but from inaction joined with action." *Ibid.*[13]

In sum, this case is fundamentally different from *Myrick*, where there was no "affirmative decision of agency officials to refrain" from regulation. 514 U.S. at 287.[14] The Coast Guard made an "affirmative decision," based on considerations of safety, that propeller guards should *not* be required on recreational boats. The state law rule advocated by petitioners, which would mandate propeller guards, is preempted because it directly conflicts with and would severely frustrate the federal

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[12] (...continued)
lation." *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) (quoting *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947)).

[13] Contrary to petitioners' assertion, the Eleventh Circuit did not decide that the mere "work of a study group, informal opinions or an agency decision to do nothing" always preempt state law. Pet. 13. In this case there was overwhelming evidence of an "affirmative decision" by an expert federal agency not to require propeller guards for safety reasons. See 514 U.S. at 287. As the court below stated, "in contrast to *Freightliner*, the relevant agency here, the Coast Guard, *did* make an affirmative decision to refrain from regulating propeller guards." Pet. App. A20.

[14] Indeed, in *Myrick* NHTSA plainly wanted to regulate stopping distances and vehicle stability, but was precluded by a court decision from doing so. See page 17, *supra*. Clearly the agency's policies were not frustrated by a state law requirement addressing those aspects of vehicle performance.

policy adopted by the Coast Guard.[15]

* * * * *

In the final analysis, petitioners can offer no credible reason why this Court should review the decision below, which is fully consistent with *Myrick* and *Cipollone*, which follows a long line of federal and state court decisions finding preemption of identical claims under the Boat Safety Act, and which does not conflict with the decision of any other court.

Moreover, the Eleventh Circuit's conclusion that petitioners' claims are preempted is plainly correct. Petitioners seek to establish a state common law rule that would require propeller guards on all recreational boats. In support of this result, petitioners actually assert — contrary to common sense and good policy — that Congress intended to have lay juries establish national boat safety rules on a case-by-case basis through litigation (Pet. 12).

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[15] Petitioners argue (Pet. 6-8) that Congress intended "that state law would only be pre-empted by 'regulations'" issued by the Coast Guard pursuant to the "formal rulemaking process" of the Administrative Procedures Act. In fact, the express preemption provision of the Boat Safety Act says exactly the opposite: state law is preempted unless it is "identical to a regulation prescribed by the Coast Guard" (46 U.S.C. § 4306).

Contrasting this language with the preemption clause interpreted in *Myrick* illustrates petitioners' fundamental misreading of both. The Motor Vehicle Safety Act preempts state law only when a federal safety standard "is in effect" (15 U.S.C. § 1392(d)). In *Myrick*, the absence of a federal regulation thus meant that the "States remain[ed] free to 'establish, or to continue in effect,' their own safety standards." 514 U.S. at 286. By contrast, the Boat Safety Act, read literally, provides that in the absence of a federal regulation the states are *not* free to regulate. (Here, of course, we have not just the mere absence of a federal regulation but the considered decision of the Coast Guard not to regulate, for reasons of safety.)

In the Boat Safety Act, however, Congress gave the Coast Guard plenary authority to set nationally uniform boat safety policy. In particular, the Coast Guard alone has been authorized to make the determination whether to require propeller guards on boats, and the Coast Guard expressly decided — after an exhaustive study — *not* to mandate that item of equipment. Petitioners' common law claim thus conflicts directly and substantially with this expert federal determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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